



BILLING CODE (3410-XV-U)

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3560

RIN: 0575AC93

### **Civil Monetary Penalties**

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed rule.

**SUMMARY:** The Rural Housing Service (RHS or Agency) proposes to implement two civil monetary penalty provisions. First, RHS proposes to amend its regulations to create a new section, for imposing civil monetary penalties under the authority of 42 U.S.C. 1490s (section 543 of the Housing Act of 1949, as amended (Act)) (Housing Act CMP). Second, RHS proposes to adopt the USDA civil monetary penalty provisions for the Program Fraud Civil Remedies Act of 1986 (PFCRA) in a revision to an existing section (PFCRA CMP). The new section will

include an amended version of the existing Housing Act CMP provision together with additional language providing procedural guidance.

**DATES:** Written comments must be received on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be assured of consideration.

**ADDRESSES:** You may submit comments to this proposed rule by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW, Washington, D.C. 20250-0742.
- Hand Delivery/Courier: Submit written comments via Federal Express mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7<sup>th</sup> Street, SW, 7th Floor, Washington, D.C. 20024.

All written comments will be available for public inspection during regular work hours at the 300 7<sup>th</sup> Street, SW, 7th Floor, address listed above.

**FOR FURTHER INFORMATION CONTACT:** Stephanie White, Director, Multi-Family Housing Portfolio Management Division, Rural Housing Service, Stop 0782, 1400 Independence Avenue, SW, Washington, D.C. 20250-0782, Telephone: 202-720-1615.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Order 12866 - Classification**

This proposed rule has been determined to be non-significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

### **Authority**

The Housing Act CMP provision is authorized under section 543(b) of the Housing Act of 1949, as amended (42 U.S.C. 1490s(b)). The PFCRA is codified at 31 U.S.C. 3801-3812. PFCRA establishes an administrative remedy against any person who makes a false, fictitious, or fraudulent claim or written statement to certain federal agencies, such as the United States Department of Agriculture.

### **Environmental Impact Statement**

This document has been reviewed in accordance with 7 CFR part 1940, subpart G. RHS has determined that this action does not constitute a major Federal action significantly affecting the quality of the environment. In accordance with the National Environmental Policy Act of 1969, Pub. L. 91-190, an Environmental Impact Statement is not required.

## **Regulatory Flexibility Act**

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. §§ 601-612). Under Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency has determined and certified by signature on this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded program nor does it require any more action on the part of a small business than required of a large entity.

## **Executive Order 13132, Federalism**

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This rule does not impose substantial direct compliance costs on State and local Governments; therefore, consultation with the States is not required.

## **Executive Order 12988, Civil Justice Reform**

This rule has been reviewed under Executive Order 12988. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

## **Unfunded Mandate Reform Act (UMRA)**

Title II of the UMRA, Pub. L. 104-4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal Agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with “Federal mandates” that may result in expenditures to State, local, or tribal Governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

## **Paperwork Reduction Act of 1995**

The revisions in this rulemaking for 7 CFR part 3560 are subject to the Paperwork Reduction Act package with the assigned OMB control number of 0575-0189. No changes are being proposed that would impact that package.

## **E-Government Act Compliance**

RHS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes.

## **Programs Affected**

The programs affected by this regulation are listed in the Catalog of Federal Domestic Assistance under Section 514 program and Section 516 program (10.405); Section 515 program (10.415); Section 521 (10.427); and Section 542 (10.448).

## **Executive Order 13175, Consultation and Coordination with Indian Tribal Governments**

This executive order imposes requirements on RHS in the development of regulatory policies that have tribal implications or preempt tribal laws. RHS has determined that the proposed rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RHS on this proposed rule, they are encouraged to contact USDA's Office of Tribal Relations or Rural Development's Native American Coordinator at (720) 544-2911 or [AIAN@wdc.usda.gov](mailto:AIAN@wdc.usda.gov) to request such consultation.

## **Executive Order 12372, Intergovernmental Review of Federal Programs**

These loans and grants are subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. RHS conducts

intergovernmental consultations for each loan and grant in a manner delineated in 7 CFR part 3015 subpart V.

**Background:**

USDA implemented the Program Fraud Civil Remedies Act of 1986 in regulations at 7 CFR part 1, subpart L. The Agency is proposing to incorporate those regulations in this rule.

Section 543(b) of the Act states that the Secretary may, after notice and opportunity for a hearing, impose a civil monetary penalty against any person, including its owners, officers, directors, general partners, limited partners, or employees, who knowingly and materially violate, or participate in the violation of the Act, or the regulations and agreements used to implement the Act. Such violations include:

- (A) Submitting information to the Secretary that is false;
- (B) Providing the Secretary with false certifications;
- (C) Failing to submit information requested by the Secretary in a timely manner;
- (D) Failing to maintain the property subject to loans made or guaranteed under the Act in good repair and condition, as determined by the Secretary;
- (E) Failing to provide acceptable management for a project which received a loan made or guaranteed under the Act that is acceptable to the Secretary; or
- (F) Failing to comply with the provisions of applicable civil rights statutes and regulations.

In 2004, the Agency included Housing Act CMPs in 7 CFR 3560.461(b) with limited procedural detail. Consequently, the Agency has found Housing Act CMPs to not be an

effective remedy. This proposed rule will provide sufficient procedural detail to enable the Agency to utilize Housing Act CMPs while at the same time providing due process protection to program participants. By implementing procedures for Housing Act CMPs, the Agency will be provided an important tool to enforce compliance with relevant statutes, regulations, and loan documents. The Agency's Housing Act CMP amount will be published in 7 CFR part 3, subpart I.

#### List of Subjects in 7 CFR Part 3560

Aged, Loan programs-Agriculture, Loan programs-Housing and Community Development, Low and moderate income housing, Public housing, Rent subsidies.

For the reasons set forth in the preamble, chapter XXXV, Title 7 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 3560 – DIRECT MULTI-FAMILY HOUSING LOANS AND GRANTS

1. The authority citation for part 3560 continues to read as follows:

Authority: 42 U.S.C. 1480.

#### Subpart J--Special Servicing, Enforcement, Liquidation, and Other Actions

2. Amend § 3560.461 by revising paragraph (b) to read as follows:

§ 3560.461 Enforcement provisions.



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(b) Civil monetary penalties. (1) This section is in accordance with the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–U.S.C. 3831) which provides for civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to Federal authorities or to their agents.

(2) Proceedings under this section will be in accordance with subpart L of 7 CFR part 1, “Procedures Related to Administrative Hearings under the Program Fraud Civil Remedies Act of 1986.”

(3) The Administrator of the Rural Housing Service, or designee, is authorized to serve as Agency Fraud Claims Officer for the purposes of implementing the requirements of this subsection.

(4) Civil penalties and assessments imposed pursuant to this section are in addition to any other remedies that maybe prescribed by law or imposed under this subpart.

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3. Add § 3560.464 to read as follows:

§ 3560.464 Civil monetary penalties.

(a) The Agency may impose a civil monetary penalty in accordance with this section against any individual or entity, including its owners, officers, general partners, limited partners, or employees (Respondent(s), who knowingly and materially violate, or participate in the

violation of, the provisions of the programs covered by this part or agreements made in furtherance of those programs. “Knowingly” includes having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this part. Actions covered include, but are not limited to:

(1) Submitting information to the Agency that is false.

(2) Providing the Agency with false certifications.

(3) Failing to submit information requested by the Agency in a timely manner.

(4) Failing to maintain the property subject to loans or grants made under the programs covered by this part in good repair and condition, as determined by the Agency.

(5) Failing to provide management for a project that received a loan or grant made under this part that is acceptable to the Agency. Such failures include, without limitation, failure to provide fiscal management in accordance with Agency regulations including failure to maintain reserve accounts and unauthorized use of fund in such reserve accounts, failure to handle vacancies in accordance with Agency regulations, and failure to handle rent collection in accordance with Agency regulations.

(6) Failing to comply with the provisions of applicable civil rights statutes and regulations.

(b) Amount. (1) Civil penalties shall be assessed and adjusted in accordance with 7 CFR part 3, subpart I or its successor regulation and must be subject to a fine per violation of not more than the amount specified in that subpart.

(2) In determining the amount of a civil monetary penalty under this section, the Agency must take into consideration:

(i) The gravity of the offense;

(ii) Any history of prior offenses by the Respondent (including offenses occurring prior to the enactment of this section);

(iii) Any injury to tenants;

(iv) Any injury to the public;

(v) Any benefits received by the Respondent as a result of the violation;

(vi) Deterrence of future violations;

(vii) The degree of the Respondent's culpability; and

(viii) The Respondent's ability to pay the penalty, which ability shall be presumed unless raised as an affirmative defense or mitigating factor by the Respondent. The ability to pay is determined based on an assessment of the Respondent's resources available both presently and prospectively from which the Agency could ultimately recover the total award, which may be predicted based on historical evidence.

(3) Payment of penalties. No payment of a penalty assessed under this section may be made from funds provided under any program covered by this part or from funds of a project which serve as security for a loan made from a program covered by this part.

(c) Agency Official. The Administrator of the Rural Housing Service, or designee, (Agency Official) may initiate a civil money penalty proceeding against a Respondent who has committed any of the actions referenced in paragraph (a) of this section.

(d) Pre-penalty notice. Prior to determining whether to issue a complaint under paragraph (f) of this section, the Agency Official shall issue a written pre-penalty notice to the Respondent. This pre-penalty notice shall include the following:

(1) That the Rural Housing Service is considering seeking a civil money penalty;

(2) The specific violations alleged;

(3) The maximum civil money penalty that may be imposed;

(4) The opportunity to reply in writing to the Agency Official within 30 days after the date of the notice;

(5) That failure to respond with the 30-day period may result in issuance of a complaint under paragraph (f) of this section without consideration of any information that the Respondent may wish to provide;

(6) That upon receipt of the pre-penalty notice, the Respondent is required to preserve and maintain all documents and data, including electronically stored data, within Respondent's possession or control that may relate to the violations alleged in the pre-penalty notice. The Agency shall also preserve such documents or data upon the issuance of the pre-penalty notice;

(7) That any response to the pre-penalty notice shall be in a format prescribed in the pre-penalty notice, and shall address the factors in subsection (a), any arguments opposing the imposition of a civil money penalty, and any affirmative defense or mitigating factor concerning the Respondent's ability to pay the proposed civil money penalty, including documentary evidence to support any of Respondent's arguments or defenses; and.

(8) That if a complaint is issued under § 3560.464(f), the Respondent may request a hearing before an administrative law judge. Proceedings under this section will be in accordance with subpart L of 7 CFR part 1.

(e) Response. (1) The response shall be in a format prescribed in the pre-penalty notice. The response shall address the factors set forth in paragraph (d) of this section and include any arguments opposing the imposition of a civil money penalty that the Respondent may wish to present.

(2) In any case where Respondent seeks to raise ability to pay as an affirmative defense

or argument in mitigation, the Respondent shall provide documentary evidence as part of its response.

(f) Complaint. (1) Upon the expiration of the 30-day response period for the pre-penalty notice, the Agency Official shall determine whether to seek a civil money penalty. Such determination shall be based upon a review of the pre-penalty notice, the response, if any, and the factors listed in paragraph (a)(2) of this section.

(2) If a determination is made to seek a civil money penalty, a complaint shall be served upon the Respondent and simultaneously filed with the USDA Office of the Administrative Law Judges, providing the following:

- (i) The factual basis for the decision to seek a penalty;
- (ii) The applicable civil money penalty statute;
- (iii) The amount of penalty sought;
- (iv) The right to submit a response in writing, within 15 days of receipt of the complaint, requesting a hearing on any material fact in the complaint, or on the appropriateness of the penalty sought;
- (v) The address to which a response must be sent;
- (vi) That the failure to submit a response may result in the imposition of the penalty in the amount sought.

(3) The complaint shall be served upon the Respondent by first class mail or personal delivery.

(g) Response to the complaint. (1) In any case in which the Respondent has requested a hearing, the Respondent shall serve upon the Agency Official and file with the USDA Office of

Administrative Law Judges a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause. The answer shall include the admission or denial of each allegation of liability made in the complaint; any defense on which the Respondent intends to rely; any reasons why the civil money penalty should be less than the amount sought in the complaint, based on the factors listed in (a)(2); and the name, address, and telephone number of the person who will act as the Respondent's representative, if any.

(2) If no response is submitted, then the Agency Official may file a motion for default judgment, together with a copy of the complaint, in accordance with subpart L of 7 CFR part 1.

(h) Hearings under this part shall be conducted in accordance with the procedures applicable to hearings in accordance with subpart L of part 1 of title 7.

(i) Settlement of a civil money penalty action. The Agency Official is authorized to settle civil money penalty actions that may be brought under this section.

(j) Remedies for noncompliance. -- (1) Judicial intervention. If a Respondent fails to comply with a final determination of the Agency imposing a civil monetary penalty, the Agency may request the Attorney General of the United States to bring an action in an appropriate District Court to obtain a monetary judgment against the Respondent and such other relief as may be available. The monetary judgment may, in the court's discretion, include attorney's fees and other expenses incurred by the United States in connection with the action.

(2) Reviewability of determination. In an action under this paragraph, the validity and appropriateness of a determination by the Agency imposing the penalty shall not be subject to review.

(k) Application of other remedies. A civil money penalty may be imposed in addition to

other administrative sanctions or any other civil remedy or criminal penalty.

November 15, 2012

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Tammye Trevino

Date

Administrator

Rural Housing Service

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